No. 3095

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LOST HILLS MINING COMPANY (a corporation) and UNIVERSAL OIL COMPANY (a corporation),

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

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PERNAU-WALSH PRINTING CO.

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Statement of the Case.

This is a bill in equity to quiet title to and for a decree that the defendants have no estate, right, title or interest in, the following described lands, to wit:

> The northwest quarter, and the southeast quarter of section thirty (30), and all of section thirty-two (32), all in township twenty-six (26) south, range twenty-one (21) east, Mount Diablo Meridian.

The action was dismissed as to the southeast quarter of section thirty-two (32).

The lands are chiefly valuable for their oil content.

The bill of complaint also prays for the appointment of a receiver pendente lite, and for a final decree enjoining defendants from asserting or claiming any right, title or interest in or to the lands, or in or to any of the minerals contained therein.

(For complaint of plaintiff, see Transcript of Record, Volume I, pages 4 to 14, inclusive.)

Paragraph 2 of the bill states that on and before the 27th day of September, 1909, the lands involved were part of the United States public lands and as such the plaintiff has ever since been the owner and entitled to possession thereof and of all oil, etc., therein contained.

Paragraph 3 sets forth that the President on September 27, 1909, withdrew and reserved the lands involved from mineral exploration, entry, settlement, etc.

Paragraph 4, that the defendants, Lost Hills Mining Company and Universal Oil Company, long subsequent to the 27th day of September, 1909, entered upon and took possession of the lands, in violation of the proprietary and other rights of plaintiff and of the order of withdrawal.

Paragraph 5, that the defendants had not discovered petroleum on the lands before the withdrawal.

Paragraph 6, that none of the defendants or their predecessors were bona fide occupants or claimants of the lands at the date of the withdrawal and in the diligent prosecution of work, and that none of the defendants, after entering upon the lands and after beginning the prosecution of the work, continued in the diligent prosecution of said work until oil was discovered.

Paragraph 7, that the defendants discovered petroleum long after the withdrawal, namely, on the 29th of July, 1910, and have been drilling numerous wells since, against the rights of the plaintiff and to the irreparable injury of the lands, and in violation of the laws of the United States and in disregard of the general governmental policy for the conservation of petroleum in the said lands.

Paragraph 8 alleges the conversion of the oil and the selling of the same.

Paragraph 9, that the defendants are now unlawfully extracting oil from the land and will, unless restrained, continue to do so to the irreparable injury to the lands.

Paragraph 10, that the defendants claim some right, under some pretended notices of location; none of the location notices and claims is valid; but said claims cast a cloud upon the title of the plaintiff and that the plaintiff is without redress except by this suit and that this suit is necessary to avoid a multiplicity of actions.

Paragraph 11 is the most remarkable one in the bill in that it states that the plaintiff, except as stated in this bill, has no other knowledge or information of the nature of any of the other claims asserted by the defendants and asks that the defendants set forth their respective claims.

Paragraph 12 alleges the value of the lands and prays:

1. That the defendants may make full answer to the allegations and fully disclose their claims to the lands.

2. That the Court may decree that these lands were withdrawn on the 27th day of September, 1909.

3. That the defendants may be decreed to have no estate, right, title, interest or claim in or to the lands or to the minerals therein.

4. That the defendants, etc., may be perpetually enjoined from asserting any claim to the lands or to the minerals and that during the progress of this suit and thereafter, the defendants may be finally and perpetually enjoined from going upon the lands or using them or extracting any of the minerals or from committing any trespass or waste upon the lands.

5. That an accounting maybe had.

6. That a receiver may be appointed to take possession of the land, etc.; lands, pipes, output, etc.

The answer of the defendants, after specifically and categorically denying the allegations of the bill, sets up as a separate defense and as a further answer to the complaint and as a plea denying the jurisdiction of this Court, a statement of facts taken from the records of the Land Department of the United States itself. This answer of the defendants is a very remarkable reply to the allegations contained in paragraph 11 of the bill in which the plaintiff says that it "has no other knowledge or information concerning the nature of any other claims asserted by the defendants herein",—when we consider that the material for this separate and further answer and defense is obtained from the plaintiff itself, i. e., from the archives, records and files of its own particular Land Department. The entire answer of the defendants is sworn to and has been introduced as an affidavit. All of the material facts set forth in the answer are also admitted by stipulation of matters of record that are taken from the Land Department records.

(For answer of defendants see Transcript of Record, Volume I, pages 19 to 112 inclusive.)

This answer of the defendants is presented under Rule 29 of the Rules for Courts of Equity of the United States, which abolishes demurrers and pleas; the rule further provides that every defense heretofore presentable by plea shall be made in the answer.

Commencing at the bottom of page 34, Transcript of Record, Volume I, the defendants

> "for a further, separate and distinct defense to the cause of action set forth in plaintiff's bill of complaint on file herein * * * allege that this Court has no jurisdiction to try and determine the matter set forth in said bill of complaint or the title to the lands described in said complaint or the right to possession of said lands" etc.:

Thereupon the answer proceeds to set up the history of the locations of the predecessors of the defendants and the proceedings taken in the Land Department to obtain patents—and which proceedings are still pending, partially heard and entirely undetermined.

Paragraphs XIII to XXII inclusive of the answer (pages 36 to 50, Transcript of Record, Volume I) contain in short and simple terms the gist of the proceedings already taken and now being taken by the defendants in the Land Office, for the purpose of obtaining a patent for the Northwest Quarter of Section Thirty (30)—one of the quarter sections involved in this suit.

The same procedure is set forth seriatim in the answer with reference to the other quarter sections involved.

Paragraph LXIII of the answer (page 103, Transcript of Record, Volume I) sets forth that all of the applications for these patents are now and were at the time of the commencement of this action pending before the Department of the Interior of the United States in the General Land Department thereof, and that neither the Commissioner

nor the Secretary of the Interior has as yet made or rendered any decisions upon these applications.

The defendants in Paragraph LXVI of the answer (page 106, Transcript of Record, Volume I) allege that all of the matters set up in the bill of complaint are under the exclusive control and jurisdiction of the Honorable Secretary of the Interior of the United States and the Honorable Commissioner of the General Land Office of the United States; that by virtue of the laws of the United States National Congress the only tribunal vested with power and authority to determine the matters set forth in the plaintiff's bill of complaint is the General Land Department of the United States; that until the Land Department shall have determined the rights of the defendants herein in and to said lands, this Honorable Court has and can have no jurisdiction over the subject matter, or of the parties.

PROCEEDINGS FOR THE DISPOSITION OF THE LANDS IN SUIT ARE AT PRESENT PENDING IN THE LAND DEPARTMENT UPON APPLICATIONS FOR PATENTS MADE BY THE DEFENDANT LOST HILLS MINING COMPANY AND ARE AS YET UNDETERMINED.

The answer of the defendants sets up in full detail the proceedings which have been instituted by the defendants to obtain patent for the lands involved. The progress of these proceedings may be briefly summarized as follows:

Applications for patents were filed covering six quarter sections (the five quarter sections involved in this suit and the further quarter section described as the southeast quarter (SE¼) of Section 32, Township 26 South, Range 21 East, M. D. M.). The dates of these applications are as follows:

NE¼ Section 32, Eagle Placer Mining Claim, No. 03457, December 2, 1911:

NW¼ Section 32, Petroleum Placer Mining Claim, No. 03448, November 25, 1911;

SW¼ Section 32, Judge Placer Mining Claim, No. 03459, December 2, 1911;

SE¼ Section 30, Signal Placer Mining Claim, No. 03432, November 18, 1911;

NW¼ Section 30, Lost Hills Placer Oil Mining Claim, No. 03431, November 18, 1911;

SE¼ Section 32, Fog Horn Mining Claim, No. 03458, December 2, 1911.

After the requisite proceedings, including publication of notice of hearing, before the Register and Receiver,—the Department of the Interior, General Land Office, on February 24, 1912, accepted the purchase price for the entire six quarter sections and issued its receipts for the same, signed by A. H. Swain, Receiver of public moneys. The entire record of these applications was thereupon forwarded to the Commissioner of the General Land Office. The Field Division had stamped upon the papers the following impression:

"PROTEST
against the validity of this entry is filed in this office.

A. O. WHITE,
Acting Chief of Field Division
Jan. 31, 1912.
(Date)."

Thereupon the Commissioner of the General Land Office asked for reports from the agents of the Field Division. In due course these reports were made to the Commissioner.

The bill of complaint as originally filed included the Southeast Quarter of Section Thirty-Two (32).

On November 29, 1915, the Commissioner of the General Land Office clear listed the application covering the southeast quarter (SE¼) of Section 32, for the Fog Horn Placer Mining Claim, No. 03458.

Following upon this clear listing the Government amended its complaint, leaving out the Southeast Quarter of Section Thirty-Two (32). (In other words, dismissing the action as to the Southeast Quarter of Section 32)—(See page 17, Transcript of Record, Volume I.)

We desire to call attention to certain findings of fact in the decision of the Commissioner clear listing this application, as these findings of fact bear upon all of the other applications. The decision is set forth in full in the stipulation of record material on file in this case. Among other things, the Commissioner stated:

"The claim was located February 14, 1907, by O. D. Barton. * * * At the same time

these persons with 28 others also located some 22 other tracts in the vicinity. Some two years or more after location, the said locators organized the Lost Hills Mining Company, a corporation, the present applicant. The several locations were transferred to the said corporation, each interested person receiving his proportionate share of the stock issued.

It thus appears that there exists no reason for questioning the good faith and regularity of the said Fog Horn location."

This same conclusion follows as a matter of course regarding the other five applications.

The Commissioner further states:

"In view, however, of the fact that at date of withdrawal the applicant appears to have been in diligent prosecution of labor looking to the discovery of oil, at least at one point, which as the result of an erroneous survey was at that time believed to be upon this claim, and, according to some of the evidence submitted, on the land itself; and in view of the large equities of the applicant company apparent in the extensive development of this particular claim, and the fact that the adjudication of this claim involves no parties other than the government itself and the applicant, I am disposed to the belief that the claimant should receive the benefit of the doubt here existing, and in the absence of other material objection, should receive patent."

In reference to the remaining five applications (which cover the lands involved in this suit) the Commissioner, in November, 1915, directed the Register and Receiver to institute adverse proceedings in view of the charges preferred by the Min-

eral Inspector of the General Land Office. A copy of these charges was served upon the defendants in each instance, and in due course the defendant Lost Hills Mining Company filed a written answer, in December, 1915, under oath, denying each of the charges. The issues, therefore, have been joined in the Land Office and hearings have been ordered. In fact, some testimony has already been introduced, pro and con, before the Register and Receiver, upon the issues joined. At present, each one of these five cases is pending before the Land Department and undetermined.

MOTION FOR RECEIVER.

The plaintiff on the 12th day of June, 1916, served a notice of motion for restraining order and receiver (page 144, Transcript of Record, Volume I.)

JURISDICTIONAL DEFENSE.

The defendants on the 23rd day of June, 1916, served a notice of motion to have the jurisdictional defense of the defendants separately heard and disposed of (page 141, Transcript of Record, Volume I).

The Court did not exercise its discretion provided for under Rule 29 of the Equity Rules of Practice, and did not separately hear and dispose of the jurisdictional defense of the defendants.

The Court set for hearing and heard the motion of the plaintiff for a restraining order. The Transcript of Record, in four volumes, contains the proceedings of this motion for restraining order.

On October 4, 1916, the Court rendered its opinion, granting a limited receivership (pages 1464 to 1476, Transcript of Record, Volume IV).

The defendants prayed for an appeal and served their assignments of errors on January 15, 1917 (pages 1485 to 1493, Transcript of Record, Volume IV); the specifications of errors relied upon are as follows:

> "I. That the United States District Court erred in making said order and in appointing said receiver.
>
> II. That said District Court erred in making said order in this that said Court had not, nor had the Judge thereof, any jurisdiction to make said order, appointing said receiver.
>
> III. That said District Court erred in not granting the motion of defendant to dismiss the bill of complaint herein.
>
> IV. That said District Court erred in holding that said District Court had any jurisdiction to try any of the issues involved in the above entitled action.
>
> V. That said District Court erred in refusing to grant the motion of defendant to dismiss the bill of complaint on the ground that the sole jurisdiction to determine the issues involved in said action was, at all times since the commencement of this action, and still is, in the General Land Department of the United States.
>
> VI. That said District Court erred in holding that the General Land Department of the

United States to whom applications had been made for patents to the lands involved in said action, did not have exclusive jurisdiction to determine all the issues involved in the above-entitled action.

VII. That said District Court erred in retaining jurisdiction of the subject matter of said suit and in appointing said receiver for the reason that the General Land Department of the United States had exclusive jurisdiction to determine all issues in said suit.

VIII. That said District Court erred in not holding that the General Land Office before whom application for patents to the aforesaid lands were pending was the only tribunal competent and having power and jurisdiction to pass upon the issues involved in the above-entitled action.

IX. That said District Court erred in holding that it had jurisdiction to determine the question of title to the lands involved in this action when it affirmatively appeared that patents had been applied for by defendants to the lands involved in this action, and there was pending and undetermined contest in the General Land Department of the United States, and that testimony was being taken upon the question as to whether or not these defendants were entitled to patents to said lands in said contest in said General Land Department of the United States.

X. That said District Court erred in refusing to grant the motion of said defendants to dismiss the bill of complaint on the ground that the Court had no jurisdiction to try the issues involved in said suit for the reason that the defendant, Lost Hills Mining Company, long prior to the commencement of the above-entitled action did duly make and file its applications for patents to said lands in the proper land office of the United States, at Visalia,

California, wherein and whereby it did apply to the United States of America and to the General Land Department thereof in accordance with the laws of the United States of America and the rules and regulations of the Department of the Interior in reference thereto; upon which said applications for patents, issue had been joined by the United States; and which said applications for patents, were, at the time of the making of said order appointing said receiver, to wit, on the 20th day of December, 1916, and, at the time of the hearing of said motion of said defendants to dismiss said bill of complaint and of the motion for a receiver, to wit, on the 21st, 22d, 23d, 24th, 25th, 28th and 29th days of August, 1916, still pending in the Land Department of the United States and undetermined, and the evidence upon the hearing of said applications for said patents was still in process of being taken in the General Land Department of the United States.

XI. That said District Court erred in making said order and decree and appointing said receiver in that long prior to the commencement of said action the defendant, the Lost Hills Mining Company, had bought the land involved in said action from the plaintiff, had pail the full purchase price therefor and had received a receipt from the plaintiff for said purchase price.

XII. That said District Court erred in refusing to grant the motion of the said defendants to dismiss said action, and furthermore erred in making said order appointing a receiver in this that the said Court never has had, and has not at the present time, any jurisdiction of the subject matter in this action.

XIII. That said District Court erred in holding and in construing the above-entitled action as one brought for ancillary relief.

XIV. That said District Court erred in holding that upon the complaint filed in the above-entitled action it had jurisdiction to grant relief by the appointment of a receiver as ancillary to the proceedings in the General Land Department of the United States.

XV. That said District Court erred in not holding that it had no jurisdiction to grant the ultimate relief asked for in the bill of complaint, and therefore that it had no jurisdiction to grant ancillary relief by the appointment of a receiver.

XVI. That said District Court erred in appointing a receiver upon the bill of complaint as filed and regarding the action as ancillary to the proceedings in the Land Department, whereas this action, as a matter of fact, was and is in opposition to and in disregard of the proceedings in the Land Department.

XVII. That said District Court erred in making said order appointing said receiver in this that said Court abused its discretion and committed an abuse of discretion in making said order.

XVIII. That said District Court erred in making said order in that the complaint of plaintiff in said action did not show facts justifying the appointment of a receiver.

XIX. That said District Court erred in directing the receiver to take charge of the oil and gas produced from said lands and to dispose of the same, and in directing the defendants to pay over to the receiver the proceeds of the sale of oil or gas produced from said lands.

XX. That said District Court erred in holding that the complainant was not amply protected as to all of its rights in the General Land Department of the United States by reason of the applications for patents to said lands involved herein on the part of the defendant, Lost

Hills Mining Company, herein, and the application on the part of the defendants, Lost Hills Mining Company, a corporation, and Universal Oil Company, a corporation, for leases under the terms and provisions of the Act of Congress of August 25th, 1914, entitled "An Act to Amend an Act Entitled 'An Act to Protect the Locators in Good Faith of Oil and Gas Land Who Shall Have Effected an Actual Discovery of Oil or Gas on the Public Lands of the United States, or Their Successors in Interest,' Approved March 2d, 1911."

XXI. That said District Court erred in making said decree and order appointing a receiver in said action in that the complaint contains no allegation that the properties in question have been, or are being mismanaged, nor was any evidence introduced, nor did the Court hold that the said properties have not been, or are not being properly and economically managed, and furthermore the complaint in this action does not allege, nor did the evidence offered at the hearing of said application show, or tend to show that any of the defendants are insolvent, nor was any evidence offered or introduced to show, nor did the Court hold that in the management and operation of said properties said defendants conducted such management and operation in any manner different from the management and operation thereof as the same could, would or should be conducted by any receiver who might be appointed in the premises.

XXII. That said District Court erred in making said order and decree in that said order is against the evidence presented at the hearing of said motion for a receiver.

XXIII. That said District Court erred in making said order and decree appointing said receiver in that said order and decree is against law."

OPINION OF THE COURT ON MOTION FOR RECEIVER PENDENTE LITE.

This opinion is found commencing on page 1464, Transcript of Record, Volume IV. It is also found in Federal Reporter 236, page 973.

A careful perusal of this opinion, we submit, shows that it is based upon the theory that the sole contention of the defendants is that the acceptance by the officers of the local Land Office, of defendants' application for a patent, and the receipt by the plaintiff of the purchase price of the land, effect a judgment in rem, and, therefore, that this Court is without jurisdiction until such judgment in rem is annulled by the proper authorities within the Land Department.

It is true that this is one of the contentions of the defendants; but the broad question as to the jurisdiction of this Court to quiet title to the lands in controversy herein, in view of the pleadings and the status of these lands in the Land Department, is the grave problem to be determined in this appeal.

The District Court in its opinion on the motion for receiver assumes that the Court has jurisdiction "if the proceedings (locations, possessions and applications for patents) are fraudulent or unlawful." There seems to be some confusion, we respectfully suggest, in the mind of the Court in making this statement. There is no allegation of fraud or unlawful procedure with reference to the locations,

possessions and applications for patents by the predecessors of the defendants in connection with the lands involved in this suit. On the contrary as shown infra in this brief, the Land Office in clear listing the Southeast Quarter of Section Thirty-two (32) (One of the quarter sections originally embraced in this suit) finds "that there exists no reason for questioning the good faith of the locator of the said Fog Horn location." This Fog Horn location was one of the series of locations made by the group of locators who were the predecessors of the defendants.

On the hearing of the motion for receiver in this case, the motion for receiver in the case of the United States of America v. Devil's Den Consolidated Oil Company was also heard and (although the two cases were entirely distinct) they were heard together and one record made upon the hearing. The pleadings in the Devil's Den Consolidated Oil Company case has an allegation affecting the good faith of the original locator—which allegation in nowise appears in this case.

It is necessary to bear in mind the distinction in the pleadings of the two cases. It is possible that the confusion arose in the mind of the Court below from not bearing this distinction in mind.

The District Court in its opinion on the motion for receiver states:

> "I am of the opinion therefore that the Court has jurisdiction to try the questions involved in these cases. If, however, I am mis-

> taken as to the extent of the jurisdiction, the government is clearly entitled, upon the allegations of the bill and the showing made, to invoke the aid of a court of equity to protect the property from waste and destruction pending the final determination of its rights therein in the Land Department out of the court."

We will, therefore, proceed to present our argument to show that the lower Court has erred in so holding.

A BILL TO QUIET TITLE TO A PORTION OF THE PUBLIC LANDS OF THE UNITED STATES CANNOT BE MAINTAINED WHERE IT APPEARS UPON THE PLEADINGS THAT A CONTROVERSY IS PENDING AS TO THE RIGHTS OF THE PARTIES IN SUCH LANDS BEFORE THE LAND DEPARTMENT OF THE UNITED STATES.

This is a bill to quiet title and to remove a cloud. Essentially similar is the bill in equity in the case of Eldora Oil Company v. U. S., 229 Federal Reporter, 9146. The Court in this last named case speaks of the bill as one to remove a cloud or to quiet title. In the case at bar, the Government asks for a decree declaring that the lands were withdrawn since the 27th of September, 1909; that the defendants may be decreed to have no estate, right, title, interest or claim in the lands or mineral output; that they may be perpetually enjoined from asserting any claim to the land or the output; that they may be enjoined from going upon any portion of the land or using the same, etc.

In the case of Eldora Oil Company v. United States, the decision in the Circuit Court of Appeals was rendered simply upon the bill itself and upon a motion to dismiss the complaint for insufficiency of facts. What, if any, standing the defendants in the Eldora case had in the Land Department does not appear from the pleadings or from the status of the case before the Court; therefore the fundamental objection raised in the case at bar was not made in the Eldora case. We do not find in any similar suits which have been brought in this circuit that there has been presented for consideration the question herein raised by the pleadings in the case at bar. The Court is here confronted by the record with a condition of affairs regarding the rights of the parties which we respectfully submit completely denies the jurisdiction of this Court to entertain the subject-matter of the suit pleaded in the bill.

The case of United States v. Schurz, 102 U. S. 167, so clearly epitomizes and defines the former decisions of the United States Supreme Court with reference to the method of disposing of the territory of the United States, that we venture to quote the following extract from that decision:

> "The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States, and under this provision the sale of the public lands has been placed by statute under the control of the Secretary of the Interior.

> To aid him in the performance of this duty, a Bureau has been created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress has confided the execution of the laws which regulate the surveying, the selling and the general care of these lands.
>
> Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen, and this Court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring title were as yet *in fieri* before this special tribunal created by Congress for deciding the questions which should arise in the course of these proceedings, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

The bill in the case at bar calls upon this Honorable Court to determine the plaintiff's right and title to the lands in question in advance of and without reference to the action of the Land Department. It is an effort to obtain a final decree determining the interests of the parties in this land while the questions in relation to the title are properly before the Land Department and not yet decided. Such a bill connot be maintained and this Court is without jurisdiction to entertain such a bill.

Cosmos Exploration Company v. Gray Eagle Oil Co., 190 U. S. 301;

Marquez v. Frisbie, 101 U. S. 473;

United States v. Schurz, 102 U. S. 167.

As was said in the case of Low et al. v. Katalla Company, 40 Land Decisions, 539:

> "The Interior Department is specifically authorized and empowered to enforce and execute the public land laws of the United States. Sections 441, 453, 2478, Revised Statutes. The land department is a quasi-judicial tribunal and has exclusive jurisdiction over the disposition of lands of the Public Domain in the absence of specific legislation to the contrary. Bishop of Nesqually v. Gibbon (158 U. S., 155); Knight v. United States Land Association (142 U. S., 161); McDaid v. Oklahoma (150 U. S., 209). Pending final action of the Department with respect to title to public lands, generally the State or Federal courts will not interfere, nor entertain actions relating thereto. Cosmos Company v. Gray Eagle Oil Company (190 U. S. 301); Marquez v. Frisbie (101 U. S. 473); U. S. v. Schurz (102 U. S., 378); Tiernan v. Miller (96 N. W., 661); Warnekros v. Cowan (108 Pac. 238)."

In the case of Ryan v. Granite Oil Company, 29 Land Decisions, 522, the following language was used:

> "No authority of law exists for transferring the proceedings from the Land Department to the Courts for a decision of that question and hence the decision of the Court thereon cannot bind or conclude the Land Department or relieve it from the duty of making its own decision in the premises."

In the case of Garfield v. United States of America, 211 U. S. 264, the Supreme Court observes:

> "We have no disposition to question those cases in which this court has held that the

courts may not interfere with the Land Department in the administration of the public lands while the same are subject to disposition under acts of Congress trusting such matters to that branch of the Government. Some of these cases are cited in the late case of U. S. v. Detroit Timber & Lumber Company, 200 U. S., 321; 50 L. Ed. 499; 26 Sup. Ct. Rep. 282, and the principle to be gathered from them is that while the land is under the control of the Land Department prior to the issue of patent, the court will not interfere with such departmental administration. This was held as late as the case of Love v. Flahive, 205 U. S. 195-198, 51 L. Ed., 768-770, 27 Sup. Ct. Rep. 486."

We respectfully assert that the only theory upon which the plaintiff could hope to maintain jurisdiction in this case is upon the assumption that the presidential withdrawal of September 27, 1909, took all of the lands which came within the purview of that withdrawal out of the domain and jurisdiction of the Land Department. In other words, this withdrawal overturned and disrupted the entire machinery of the Land Department in its disposition of the public lands of the United States. It is quite evident, however, that this was not the intention of the presidential order of September 27, 1909. The letter of the President is found on page 135 of Petroleum Withdrawals and Restorations Affecting the Public Domain, and reads as follows:

"September 27, 1909.

The Honorable,

The Secretary of the Interior.

Sir:

In accordance with your orders I have the honor to submit the following recommenda-

tion which covers approximately 3,041,000 acres of which the larger part is probably private land and not affected by this withdrawal.

TEMPORARY PETROLEUM WITHDRAWAL No. 5.

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination."

The last sentence of the letter clearly refutes any such intention of the Government.

In the Act of June 25, 1910 (36 Stat. 847), confirming the presidential withdrawal, Section 2 provides:

"Provided, that the rights of any persons, who at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupancy or claimant shall continue in diligent prosecution of said work."

THE INTENTION AND PURPOSES OF THE BILL IN THIS CASE ARE TO NOT ONLY IGNORE BUT TO USURP THE JURISDICTION AND FUNCTIONS OF THE LAND DEPARTMENT. IT ASKS FOR A PERMANENT AND CONCLUSIVE DECREE QUIETING TITLE IN FAVOR OF THE GOVERNMENT AGAINST THE DEFENDANTS. SUCH A DECREE TO BE EFFECTIVE WOULD HAVE TO ACT AS RES ADJUDICATA. IN VIEW OF THE UNBROKEN LINE OF DECISIONS THIS COURT IS WITHOUT JURISDICTION TO RENDER SUCH A DECREE OR TO INTERFERE IN ANY MANNER WITH THE PERFORMANCE OF THE JUDICIAL DUTIES OF THE OFFICERS OF THE INTERIOR DEPARTMENT.

Many cases have been considered by the Federal Courts involving the question of the right to obtain a writ of mandamus or a writ of injunction against the officers of the Land Department. The distinction is definitely drawn in all of these cases between purely ministerial acts and acts calling for the exercise of discretion or judicial interpretation of the laws governing the disposition of the public lands. Whenever, pending the applications for patents, or the determination of rights to lands, there are matters undetermined and which call for the decision of the Interior Department, the Courts have never been allowed to interfere or to assume jurisdiction.

The case of U. S. v. Fisher (Secretary of the Interior), 223 U. S. 683, very clearly elucidates this distinction. This was a petition of one Mary S. Ness for a writ of mandamus, to compel the Secretary of the Interior to accept an application to purchase certain land under the Timber and Stone Act of January 3, 1878. After the Interior De-

partment had rejected the application, one Taylor made application at the local Land Office to purchase the land under the same Act, and his application, which appeared to be in conformity with the statutory requirements, was accepted by the local officers and was being carried to final entry when this petition for a writ of mandamus on behalf of Mary S. Ness, and the answer of the Interior Department, were filed. The Court says:

> "So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law, and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own, and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative. Decatur v. Paulding, 14 Pet. 497, 515, 10 L. Ed. 559, 568; United States ex rel. Tucker v. Seaman, 17 How. 225, 230, 15 L. ed. 226, 227; Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62; Litchfield v. Register (Litchfield v. Richards) 9 Wall. 575. 19 L. ed. 681; United States v. Schurz, 102 U. S. 378, 26 L. ed. 167; United States ex rel. Dunlap v. Black, 128 U. S. 40, 48, 32 L. ed. 354, 357, 9 Sup. Ct. Rep. 12; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324, 47 L. ed. 1074, 1078, 23 Sup. Ct. Rep. 698."

The Court then quotes from the Decatur case, just above cited, as follows:

> "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would

> be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given to them."

Taking up the Riverside Oil Company case, just above cited, where it was sought by mandamus to compel the Secretary of the Interior to depart from a decision of his to the effect that a forest reserve lieu land selection must be accompanied by an affidavit that the selected land was non-mineral in character and unoccupied, it was held that his judgment and discretion could not be thus controlled, it being said:

> "Congress has constituted the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands."

Continuing a quotation from U. S. v. Fisher, the Court says:

> "The Court has no general supervisory power over the officers of the Land Department by which to control their decisions upon questions within their jurisdiction."

In the case of U. S. v. Lane (Secretary of the Interior), 228 U. S. 6, where the Court refused a writ of mandamus to require the Secretary of the Interior to issue a land patent (decided in 1913), the Supreme Court further emphasizes the exclusive jurisdiction of the Land Department. After finding that the Secretary in this particular

proceeding was still clothed with discretionary powers and still had authority to reconsider and vacate his former decision, the Court quotes extensively from the opinion in Brown v. Hitchcock, 173 U. S. 473, and from U. S. v. Schurz, cited above. The important quotation from Brown v. Hitchcock, is as follows:

> "But what we do affirm and reiterate is that power is vested in the departments to determine all questions of equitable right or title, upon proper notice to the parties interested, and that the Courts must, as a general rule, be resorted to only when the legal title has passed from the Government."

Again referring to the case of U. S. v. Schurz, we venture to quote the following extract:

> "To the officers of the Land Department, among whom we include the Secretary of the Interior, are confided, as we have already said, the administration of the laws, concerning the sale of the public lands. The land in the present case had been surveyed, and the lands in that District generally had been opened to pre-emption, to homestead entry and to sale, under their control. *The question whether any particular piece of land belonging to the Government was open to sale, to pre-emption or to homestead right is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question is judicial in its character, as also the decision of conflicting claims to the same land by different parties.* (The italics are ours.)
>
> It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that depart-

ment before the successive officers of higher grade, up to the Secretary."

If the question is asked, "When is it that the United States Courts can assume jurisdiction over this subject-matter?", the answer is, "When the Interior Department has finally decided the issues before it". We again turn to the case of U. S. v. Schurz, wherein the Court says:

> "But we have also held that when, by the action of these officers and of the President of the United States, in issuing a patent to a citizen, the title to the land has passed from the Government, the question of who is the real owner of it is open in the proper courts to all the considerations appropriate to the case. *And this is so, whether the United States shall sue to set aside the patent and recover back the title so conveyed* (The italics are ours), as in U. S. v. Stone, 2 Wall. 525 (69 U. S. XVII., 765), or an individual shall sue to have the title conveyed by the patent held by the patentee in trust for that individual, on account of equitable circumstances which entitle him to that relief. Johnson v. Towsley, 13 Wall., 72 (80 U. S. XX., 485), and other cases."

In the case of Litchfield v. Richards (Register) and Pomeroy (Receiver), 76 U. S. 575, the appellant filed his bill in the Circuit Court to restrain defendants from entertaining and acting upon certain applications to prove pre-emptions to lands lying within the district for which the defendants were Register and Receiver. The bill recites the various Acts of Congress by which the plaintiff claims that the land became his property. The Court says:

"The lands in controversy are situated within the land district over which the officers had authority to receive proof of pre-emption, and grant certificates of entry. There is within that district, of course, land open to sale and pre-emption. There would be no use for the Land Office if there were not. The very first duty which the Register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? *Has it been reserved by any action of Congress or of the proper department?* Has it been granted by any act of Congress or has it been sold already? These are all questions for him to decide and they require the exercise of judgment and discretion. The bill shows on its face that these officers in the exercise of this duty were considering *whether the reservations of the departments and the acts of Congress*, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and pre-emption, and he asks the Court to interfere by injunction to prevent them from determining that question, and that the Court shall determine it for them. He says the Court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the Court in possession of their views, and defend their instructions from the Commissioner and convert the contest before the Land Department into one before the Court. This is precisely what this Court has decided that no court shall do. After the land officers shall have disposed of the question if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they give patents

> to the applicants for pre-emption, the courts can then in the appropriate proceeding, determine who has the better title or right. To interfere now is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court." (The italics are ours.)

Again:

> "The principle has been so repeatedly decided in this court that the judiciary cannot interfere either by mandamus or injunction with executive officers, such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here."

Nothing could be clearer than this declaration of the Supreme Court that whether the lands involved have been reserved or withdrawn by any action of Congress or any action of the executive, is one of the matters which is to be determined by the Land Department and which in their determination the officers thereof must exercise judgment and discretion.

See, also,

Gaines v. Thompson, 74 U. S. 62;
Cox (Secretary) v. McGarraghan, 76 U. S. 579 (also entitled Cox v. U. S.);
Sioux City v. U. S., 34 Fed. Rep. 835.

In the case of Steel v. St. Louis Smelting Company, 102 U. S. 226, the Supreme Court says:

> "We have so often had occasion to speak of the land department, the object of its creation

> and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different Acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

ANCILLARY PROCEEDINGS.

The Supreme Court of the United States observed in the case of Cosmos Exploration Company v. Gray Eagle Oil Company, 190 U. S. 302:

> "The bill is not based upon any alleged power of the Court to prevent the taking out of mineral from the land pending the decision of the Land Department upon the rights of the complainant, and the Court has not been asked by any averments in the bill or in the prayer for relief to consider that question."

This language is equally applicable to the bill in the case at bar. The plaintiff in the bill ignores, and, in fact, repudiates the jurisdiction of the Land

Department to determine the rights of the parties. The Court would not necessarily have been apprised of the fact that the plaintiff had already selected another forum in which to determine the rights of the parties had not the defendants appeared by a separate and further answer setting up the pendency of these proceedings and specifying the issues which have been joined and which are as yet undetermined in the Land Department.

THE COURT HAVING NO JURISDICTION OF THE SUBJECT-MATTER, CANNOT APPOINT A RECEIVER IN THIS PROCEEDING.

In the course of the oral argument of the learned counsel for the plaintiff in the court below, the intimation was made in a general and casual way, that the present motion for a temporary injunction and receiver was simply an ancillary matter to preserve the property in statu quo pending the decision of the Court on the merits of the case after final hearing. We are led to the supposition that what was in counsel's mind was that this Court might, by going through the pleadings and issues joined, find sufficient material upon which to consider a preliminary motion for a temporary receiver and injunction.

We respectfully submit that not only would this be entirely beyond the province of the Court, but such an idea cannot be entertained in view of the nature of the bill.

A temporary receivership is an auxiliary and provisional remedy which is granted by the Courts for the purpose of preserving the property until a final hearing upon the *merits* and a determination of the issues joined. The application for a receiver may be made in two ways:

1. In a pending proceeding where the Court has jurisdiction to determine the rights of the parties, an application for a receivership *pendente lite* is appropriate.

2. An application for receivership may be made as a separate and distinct proceeding in a separate Court where the applicant sets up that there is already pending a proceeding in another Court which has jurisdiction over the parties and the subject-matter.

The form and substance of the bill in this case bring the present application for a temporary receiver within the first category. This is a bill to quiet the title of the plaintiff and to perpetually enjoin the defendants from going on the land or from ever asserting any rights therein or thereto. The action is brought upon the theory that this Court, at this time, has jurisdiction to finally determine the rights of the parties with respect to the property which is described in the complaint. The controlling purport of the bill is to obtain a decree from this Court determining the rights of the defendants at the present time, and notwithstanding the fact that these rights are now being passed upon by a specially provided tribunal organized

for that purpose, namely, the Land Department, and which rights as yet are undetermined.

Under the pleadings, therefore, as they now stand—and upon an application for an injunction and receivership *pendente lite*—the Court must first determine that it has jurisdiction to make such injunction and receivership perpetual, that is to say, that it has jurisdiction of the primary object of the litigation between the parties.

> "It is well settled as a general rule, that the appointment of receivers is an ancillary remedy in aid of the primary object of a litigation between the parties, and such relief must be germane to the principal suit; and a suit cannot be maintained upon this general rule where the appointment of a receiver is the sole primary object of the suit and no cause of action or ground for equitable relief otherwise is stated."
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> 34 Cyc., 24;
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> Hutchinson v. American Palace-Car Co., 104 Fed. 128;
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> Gutterson & Gould v. Lebanon Iron & Steel Company, 151 Fed. 73;
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> Martin v. Harnage, 26 Okla. 790; 110 Pac. 781;
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> State v. Ross, 122 Mo. 435; 25 S. W. 749;
>
> Condon v. Mutual Reserve Fund Life Association, 84 Md. 99; 42 Atl. 944;
>
> People v. Weighley, 155 Ill. 491; 40 N. E. 30.

> "If the main object of the suit fails or the the Court has no jurisdiction of the subject-matter of the main relief sought a receiver cannot be appointed."
>
> 34 Cyc., 29.

The Court discussed this principle in Hutchinson v. American Palace-Car Co., supra, in the following language:

> "This case brings to the court three essential conditions, compliance with which is necessary to justify the appointment of a receiver as now asked for: First, that the case be fairly within the jurisdiction of the court having in view both the limited jurisdiction of federal tribunals and the true nature of proceedings in equity; second, that some proper final relief in equity be asked for in the bill which will justify the court in proceeding with the case; and third, that the circumstances calling for a receiver be of a clear and urgent character.
>
> The first and second conditions, of course, run into each other. It is occasionally said on an application for a receivership, that all the parties in interest have agreed. This does not relieve the court from looking at the question of jurisdiction, and especially from inquiring whether the application for the receivership is really with the view of obtaining final relief, or merely for the purpose of securing a receivership for the mere sake of the receivership. It is true that, when the subject-matter is of itself of an equitable nature, certain conditions which might be availed of to defeat jurisdiction may be waived. Hollins v. Iron Co., 150 U. S. 371, 380, 14 Sup. Ct. 127, 37 L. Ed. 1113. This, however, cannot go to the extent of justifying the court in appointing a receiver merely because all the parties in interest agree thereto. Not only does this not justify the court in taking jurisdiction where it ought not to, but it requires it to say to the parties that, if they are agreed, they are capable of making amicable adjustments or arrangements without its assistance, so that, therefore, there is no occasion for relief in equity. But, so far as

the case at bar is concerned, this topic is of special importance, because the bill does not properly point out any suitable final relief, and on the presentation of the case at bar the counsel for the complainants were not able to state what final relief the complainants desire. The bill contains no prayer for special relief. It does contain a prayer for general relief, but the frame of the bill is such that it is impossible for the court to perceive on the present hearing, what relief the complainants could properly ask for, or what they intended to ask for. On this matter being opened by the court during the hearing, it was plain to be seen, from the statement of the counsel for the complainants, that in filing the bill they had no clear purpose for final relief, and that they desired the appointment of a receiver only in order that the receiver might become a party respondent in certain litigation in New Jersey."

In Condon v. Mutual Reserve Fund Life Association, 89 Md. 99; 42 Atl. 744, the Court said:

> "There is no averment cognizable by a Maryland Court justifying the appointment of a receiver as asked for in the sixth prayer for relief. The allegation of insolvency is not sufficient to found such a drastic measure on. Unless the plaintiff has a standing in Court, unless he presents on the face of his bill a case of which jurisdiction can be taken, a bare allegation of insolvency will not warrant the appointment of a receiver. If the Court has no jurisdiction over the subject-matter of the proceeding, it has no authority to appoint a receiver."

In People v. Weighley, 155 Ill. 491; 40 N. E. 30, which was an action brought to dissolve a corpora-

tion and settle its affairs and asking for a receiver's appointment, a proceeding was instituted to punish for contempt a party refusing to recognize the order of the Court appointing a receiver during the consideration of the authority of the Court to punish the party for contempt, the Court had occasion to discuss the authority of the Court to appoint a receiver where it had no other equitable jurisdiction. In the case that Court stated:

> "The appointment of a receiver was a mere incident to that relief, to enable the Court to take possession of the property and business of the company and finally wind up its affairs. It is clear if the Court was without jurisdiction to grant the ultimate relief prayed by the bill it had no power to appoint the receiver and authorize him to assume possession and control of the corporation assets."

After discussing the question of the Court's jurisdiction and that it had no jurisdiction to grant the ultimate relief prayed for, the Court continued:

> "That the ultimate relief prayed for cannot be lawfully granted by the Court upon the bill, it seems to us must be conceded. Can it be said, nevertheless, that the Court in making the interlocutory order appointing the receiver, only proceeded irregularly and therefore the validity of that order cannot be questioned in this proceeding? We think not. Having no general equity powers in the case and the bill wholly failing to bring it within the provisions of Section 25, the Superior Court exceeded its jurisdiction in making the order which appellees are charged with violating and that order must therefore be held void."

A study of the case of Cosmos Exploration Co. v. Gray Eagle Oil Company in the three decisions rendered,

First: 104 Fed. Rep. 20 (Circuit Court, Southern District of California, September 24, 1900);

Second: 112 Fed. Rep. 4 (Circuit Court of Appeals, Ninth Circuit, November 15, 1901); and

Third: 190 U. S. 301 (Supreme Court of the United States, May 18, 1903),

defines clearly the lack of jurisdiction of the Court as to the subject-matter in the case at bar. The Cosmos case was decided before the promulgation of the rules of the Supreme Court of the United States (1912), abolishing demurrers, and calling upon the defendants to set forth, in a separate and special answer, any matters of defense.

The Cosmos case was a bill in equity to quiet title. The defendants are alleged to be in possession and to be extracting large quantities of oil. The bill includes the prayer for an injunction and for the appointment of a receiver. The defendants appeared both by demurrer and verified answers, the answers being used as affidavits. The case came on upon an order to show cause why a receiver should not be appointed. The demurrer filed was upon the ground, among others, that the Court is without jurisdiction of the subject-matter. In the Circuit Court, Judge Ross states as follows (104 Fed. Rep. 40):

> "The demurrers to the present bills raise the questions of jurisdiction, and of the sufficiency

of the bills themselves. The bills expressly allege that upon the making of the selections under which the complainants claim, and the publishing of the notice required by the local rules and regulations of the land department, the defendants to the bills initiated in the land office contest by written protests against such selections, on the ground that the lands selected were mineral lands, and not, therefore, subject to selection under the act of June 4, 1897, and that those contests are still pending in the land department. Those averments of the bills, in my opinion, state the complainants out of court; for no court can lawfully anticipate what the decision of the land department may be in respect to the contests, nor direct in advance what its decision should be even in matters of law, much less in respect to matters of fact, such as is that relating to the character of any particular piece of land. It was so decided by this court in the case of Savage v. Worsham in an opinion filed April 4, 1892 (104 Fed. 18), and has been likewise decided by other courts. Gaines v. Thompson, 7 Wall. 347, 19 L. Ed. 62, and cases there cited; Sioux City & St. P. R. Co. v. U. S. (C. C.), 34 Fed. 835."

In the Circuit Court of Appeals (112 Fed. Rep. 7), the Court says:

"The demurrer, interposed by defendants, questions the jurisdiction of the Circuit Court. We are of the opinion that the Federal Courts are without jurisdiction to entertain a suit to determine the respective rights of the parties to any land to which the title remains in the Government of the United States in regard to which, as shown by the averments in the present bill, a contest between the parties is pending in the Land Department of the Government."

In the decision of the Supreme Court of the United States (which we have quoted extensively, supra), this principle is not only reiterated, but elaborately commented upon with reference to the long line of similar decisions.

PRIOR TO THE INSTITUTION OF THE SUIT AT BAR THE PLAINTIFF HAD ALREADY SELECTED THE FORUM IN WHICH TO DETERMINE THE RESPECTIVE RIGHTS OF THE PLAINTIFF AND THE DEFENDANTS TO THE LANDS INVOLVED. THE JURISDICTION HAVING BEEN COMMITTED TO A PARTICULAR TRIBUNAL, THE CASE CANNOT BE TAKEN UP AND DECIDED BY ANY OTHER WHILE PROCEEDINGS ARE PENDING BEFORE THAT TRIBUNAL.

The case of Astiazaran v. Santa Rita Land Co., 148 U. S. 80, clearly lays down the rule that where jurisdiction of a case has been committed to a particular tribunal, while proceedings are pending before that tribunal, the case cannot be taken up and decided by any other.

The plaintiffs in this case, in 1887, filed a bill in the District Court of Arizona to quiet their title to certain lands granted by the Mexican Government to their predecessors. The defendants, as early as 1864, had presented a petition to the surveyor general asking for a confirmation to their title, and the surveyor general, in 1880, made a report to Congress recommending confirmation of defendants' title. Congress never took action upon this recommendation. For the confirmation of Spanish grants in New Mexico, Congress had

reserved to itself the determination of such claims and enacted that the surveyor general, under the instructions of the Secretary of the Interior, should ascertain the extent of such claims and lay the same before Congress. The Court says:

> "The action of Congress, when taken, being conclusive upon the merits of the claim, it necessarily follows that the judiciary cannot act upon the matter while it is pending before Congress; for if Congress should decide the same way as the court, the judgment of the court would be nugatory; and if Congress should decide the other way, its decision would control. * * * The case is one of those, jurisdiction of which has been committed to a particular tribunal and which cannot, therefore, at least while proceedings are pending before that tribunal, be taken up and decided by any other." (Citing Johnson v. Towsley, 80 U. S. 72, and many other cases.)
>
> "In this case Congress has constituted itself the tribunal to finally determine upon the report and recommendation of the surveyor general, whether the claim is valid or invalid. The petition to the surveyor general is the commencement of proceedings which necessarily involve the validity of the grant from the Mexican Government under which the petitioners claim title; the proceedings are pending until Congress has acted; and while they are pending, the question of the title of the petitioners cannot be contested in the ordinary courts of justice."

Brown v. Hitchcock, 173 U. S. 473;

Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. Rep. 4;

Savage v. Worsham, 104 Fed. Rep. 18.

The lower Court in the case at bar, in expressing its doubt as to the extent of its jurisdiction, cites the case of El Dora Oil Co. v. United States (229 Fed. Rep. 946) in support of granting receivership. In that case no issue was raised by the defendants, or either of them, as to the jurisdiction of the Court.

The Court says:

> "The question of jurisdiction was not raised by the motion to dismiss and in the absence of an answer the issues to be tried are undetermined."

In the case of Cosmos Exploration Co. v. Gray Eagle Oil Co. (United States Circuit Court of Appeals, 112 Fed. 4), the Court says, on page 10:

> "We are of the opinion that the Circuit Court had no jurisdiction to try the title to the property, or to adjudge the complainant to be entitled to the possession thereof."

The bill in equity in that case was quite identical in its allegations to the one in the case at bar. We submit that in this case at bar the Court has no jurisdiction to adjudge the complainant to be entitled to the possession of the lands involved. If it is not entitled to the possession of the lands, it certainly is not entitled to the benefit of any ancillary proceedings with reference thereto.

RECENT DECISIONS.

In the case of United States v. Record Oil Co. (242 Fed. Rep. 746), United States District Court,

Southern District of California (decided June 8, 1917), Judge Bean (who granted the receiver in the case at bar) denied the restraining order and dismissed the bill of complaint. The bill was similar in purpose to the one now under discussion.

In that case the purchase price of the lands had been received by the Government, and a final certificate had been issued.

The Court states:

> "This title is, of course, subject to the jurisdiction of the Land Department and for proper cause may be cancelled by it. It may also be cancelled and set aside for fraud, by the courts, in a proper suit brought by the government for that purpose (U. S. v. Lost Hills, 236 Fed. 973), but until the entry is lawfully cancelled the entryman is in possession under an equitable title and to 'be treated as though patent had been delivered'. (Dahl v. Haunheim, 132 U. S. 262; El Paso Brick Co. v. McKnight, 233 U. S. 257.)"

We submit that the Court was wholly in error in referring to the case at bar as being one to cancel and set aside for fraud any right or title of the defendants. We again respectfully reiterate that no such issue is raised by the bill of complaint in this case. As a matter of fact, the finding of the Commissioner of the General Land Office, in clear listing the southeast quarter of section thirty-two (32) (one of the quarter sections originally involved in this suit) shows conclusively that the good faith and honesty of the locators are beyond question. There is not the slightest sugges-

tion of fraud, dummies, paper locations or any other detrimental elements in the entire record.

Judge Bean also states in the case of United States v. Record Oil Co.:

> "It is claimed also that in any event the plaintiff is entitled to invoke the aid of a Court of Equity to protect the property from waste and destruction pending final disposition of the patent application by the Land Department. But the bills are not framed on that theory and contain no allegation upon which such a decree could be based."

In the case of Consolidated Mut. Oil Co. v. United States (245 Fed. 521) the Circuit Court of Appeals for this circuit states:

> "Not only has no attack, so far as apears, been made by the government on the register's final certificate of entry, but there is in these cases not the slightest showing of any fraud or lack of good faith at any time on the part of the appellants or of any of their predecessors in interest."

In the case at bar, neither by the averments of the bill nor in the record of the proceedings on the motion for a receiver, is there the slightest showing of any fraud or lack of good faith at any time on the part of the appellants or their predecessors in interest.

We submit that the only theory upon which the plaintiff could hope to obtain a receiver against the defendants herein, would be upon the hypothesis that this bill is a separate and distinct proceeding which sets up that there is already pending a suit

in another court which has jurisdiction over the parties and the subject matter; that in view of this status and for certain clear and urgent reasons, a receiver is necessary, and that the bill itself is purely one to maintain the property in statu quo pending the outcome of the other litigation in the other court.

It must be apparent that the averments of the bill in the case at bar are at total variance with such a theory. The bill is one to quiet title; the fact that proceedings are pending between the same parties in another court of competent jurisdiction to determine the title to the same subject matter is ignored in the bill.

We respectfully submit that the order of the lower Court appointing a receiver should be vacated, and the bill of equity dismissed.

Dated, San Francisco,
February 18, 1918.

JOSEPH D. REDDING,
Attorney for Appellants.